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The Constitution, Aliens Control Act, and Xenophobia: The Struggle to Protect South Africa's Pariah—the Undocumented Immigrant

THOMAS F. HICKS*

INTRODUCTION

Since the fall of the apartheid regime and the dawn of a promising democratic government, immigrants¹ from neighboring southern African countries have increasingly sought entry into South Africa.² Awaiting these immigrants, in stark contrast to their expectations of social and legal security, is a harsh climate of xenophobia.³ South Africa, burdened by the need to repudiate the violent history of the apartheid regime and to transform into a democratic society, has had little patience to address the needs of immigrants. A confluence of factors has created a hostile environment for immigrants. These factors include: a culture of violence cultivated by the apartheid regime; current domestic problems which test South Africa's resources; the public's unrealistic expectations of post-apartheid South Africa, which are reinforced by the government's Reconstruction and Development Program;⁴

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1. I use the term "immigrant" to refer to both documented (i.e., legal) and undocumented (i.e., illegal) immigrants who are in South Africa on either a temporary or permanent basis. I will focus, however, upon using the term "immigrant" to refer to undocumented immigrants who are in South Africa. Due to the Paper's limited scope, it will not attempt to analyze an immigrant's motivation for coming to South Africa and what she actually does once in South Africa.

2. The government that believes there are 2 to 12 million undocumented immigrants in South Africa. This figure may be inflated and is likely to have been derived unsoundly considering there is little research supporting such high figures. See *infra* note 45 and accompanying text.

3. Xenophobia appears to be increasing: in one poll, 16% of South Africans wanted a complete ban on foreigners in 1996. By 1998, this figure rose to 25% with only 6% favoring foreigners entering the country. Jonathan Crush & Robert Mattes, *Xenophobia: Hostility "Growing Alarming"*, 2 CROSSINGS, no. 3 (Oct. 1998) (visited Oct. 14, 1999) <<http://www.queensu.ca/samp/crossings/vol2no3/vol2no3.html>>. See *infra* note 36.

4. The Reconstruction and Development Program is the African National Congress' (ANC) program to erase the vestiges of apartheid to create a democratic and equal society for all South Africans. See *infra* note 18.

and a misguided and Draconian immigration policy centered around the Aliens Control Act (ACA)⁵—a vestige from the apartheid era.

The South African Department of Home Affairs,⁶ police, general public, and others involved in immigration enforcement matters have abused, and at times violently assaulted, undocumented immigrants in a xenophobic environment which perpetuates human rights violations and deprives immigrants of constitutional protections guaranteed by the 1996 Constitution's Bill of Rights.⁷ The influx of immigrants has increased the pressure upon the South African government to utilize its limited resources for its citizenry and fulfill its promises of economic and social reform. A culture of xenophobia, evidenced by negative perceptions of and increased violence against immigrants, has quickly materialized and consumed South Africa's consciousness. Within this setting, South Africans have developed a tendency to scapegoat immigrants by blaming them for the country's domestic problems. Suspected undocumented immigrants receive the brunt of the public's wrath.

To mitigate the abuse and improve the level of protection afforded immigrants, the judiciary must be the vanguard in firmly upholding the rights of immigrants. The courts cannot rely upon the general public because, as long as South Africa's society remains tumultuous, the public will be inclined to scapegoat immigrants and espouse xenophobic beliefs against them. The courts cannot rely upon the government because the government remains visibly committed to its policy of expelling all undocumented immigrants in

5. Aliens Control Act (Act 96 of 1991) is the law controlling immigration policy. The Aliens Control Act was spawned during the apartheid era, and remains as a relic of the past, in stark contrast to the policies underlying its present Constitution. See *infra* note 7. Critics of the Aliens Control Act note that it is one of the most ignominious remnants of the apartheid regime, symbolizing the racist and anti-Semitic sentiments inherent in the past society, and today, institutionalizing the practice of favoring whites over non-whites in immigration-related issues. Human Rights Watch, "Prohibited Persons: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa," at app. A, 6 (1998) (visited Oct. 14, 1999) <<http://www.hrw.org/reports98/sareport/>> [hereinafter Human Rights Watch].

6. The Department of Home Affairs is the government office responsible for setting policy and handling immigration and refugee matters (since 1994 Dr. Mangosuthu Gatsha Buthelezi has been the Minister of Home Affairs). See *infra* note 44.

7. S. AFR. CONST. 1996 (Act 108 of 1996) [hereinafter 1996 Constitution]. South Africa first created the South African Constitution (Act 200 of 1993) [hereinafter Interim Constitution] and later adopted the 1996 Constitution on May 8, 1996, which came into force on February 4, 1997. SOUTH AFRICA, HUMAN RIGHTS WATCH WORLD REPORT 67 (1998), also available in (last modified Mar. 10, 1999) <http://www.hrw.org/hrw/worldreport/Africa-11.htm#P914_246955>. The Bill of Rights, in chapter two of the 1996 Constitution, delineates the rights of both citizens and non-citizens and is the pertinent instrument for examining the rights of undocumented immigrants.

order to deflect criticism for its shortcomings in effecting immigration-related reforms.

This Paper will examine the vulnerable position faced by immigrants, especially undocumented immigrants, by focusing on the nature of the xenophobia, abuse, and violence that plague them. This Paper asserts that South Africa's violent apartheid history, coupled with its pressing domestic problems, has relegated immigrants to a pariah-like status—isolated to defend themselves against the ACA in a xenophobic society. The judiciary remains the only viable power to turn back the tide of xenophobia by embracing the 1996 Constitution to affirm immigrant rights. Part I will briefly review South Africa's history and present social problems as a backdrop for examining the current status of South African immigrants. Part II will examine the abnormally high level of xenophobia in South Africa and will explore how the South African public, police, and government not only fail to quell the culture of xenophobia, but actually fuel its growth—ultimately implicitly sanctioning abuse and violence against immigrants. In light of the questionable actions the public, police, and government have taken, Part III will analyze the ACA and 1996 Constitution to reveal that many of the practices against immigrants are inhumane and unconstitutional. Part IV asserts that where the government fails to fulfill its duty, the judiciary, by invoking the expansively drafted rights embodied in the 1996 Constitution, must step in to protect the immigrant's right to physical and legal security.

I. THE APARTHEID REGIME'S LEGACY OF DOMESTIC TURMOIL

The apartheid regime's policies have detrimentally shaped South Africa's present social and economic landscape and ultimately are responsible for much of South Africa's current immigrant population. From an initial violent history of conquest, in 1948, the Afrikaner National Party⁸ gained power and instituted the apartheid regime to segregate white South Africans from non-white South Africans. More importantly, the regime hoarded the social and

8. The Afrikaner National Party, also known as the National Party, consisted mainly of the Boers. The Boers, also known as Afrikaners, and the English initially settled South Africa by conquering the African tribes then inhabiting the southern African region, most notably the nomadic Khoi-San nations. Peter N. Bouckaert, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375, 377 (1997). Later, the English and Afrikaners would engage in the bloody Anglo-Boer War at the beginning of the twentieth century, with the Afrikaner's National Party eventually gaining power to later implement its apartheid regime. *Id.* at 377. See also *Afrikaners* (visited Oct. 14, 1999) <<http://www.science.gmu.edu/~bwallet/afrikaners.html>>.

economic resources for the white minority by promulgating openly discriminatory legislation.⁹ The welfare of the non-white majority deteriorated as the National Party systematically deprived the majority of medical, educational, housing, and social welfare assistance.¹⁰

After South Africa implemented its apartheid policies, domestic resistance organizations quickly formed, most notably the African National Congress (ANC).¹¹ The resistance movement against the apartheid government culminated in civil strife and violence which peaked during the 1980s.¹² The apartheid system began to crumble during the late 1980s and early 1990s¹³ as the Cold War ended¹⁴ and international condemnation mounted via increased economic sanctions against South Africa. After secret negotiations with Nelson Mandela¹⁵ and other resistance leaders, the South African government, led by Frederik Willem de Klerk,¹⁶ agreed to abolish the apartheid system and hold a national election in accordance with the newly created Interim Constitution¹⁷ in 1994.

9. Bouckaert, *supra* note 8, at 377. Under the apartheid program, the National Party enacted legislation to uproot forcibly millions of non-white South Africans from their homes to peripheral land, often ill-suited for farming, called "homelands." *Id.* at 404.

10. *Id.* As testimony of the socioeconomic injustice apartheid created, during the apartheid period 87% of South Africa's best land was reserved for white South Africans who constituted 13% of the population. Zola Skweyiya, *Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models*, 21 COLUM. HUM. RTS. L. REV. 211, 213 (1989). Also, when the apartheid regime collapsed in 1994, only 7% of white South African households were considered under the poverty line, while 67% of black South African households, 38% of interracial households, and 18% of Asian South African households were found to be under the poverty line by the World Bank. Bouckaert, *supra* note 8, at 404 (citing ANDREW WHITEFORD & MICHAEL MCGRATH, *DISTRIBUTION OF INCOME IN SOUTH AFRICA* 62 (1994)). As of 1991, the average income for white South Africans was at least eight times greater than that of black South Africans. *Id.* at 404.

11. The ANC is not a true political party; instead, it is an umbrella group of political parties, that represents diverse ideologies and acts as a coalition of political organizations with the united goal of eradicating the practice of racial oppression. Its unifying tenet is the equality of all South Africans.

12. ALLISTER SPARKS, *THE MIND OF SOUTH AFRICA* 329-61 (1990).

13. Bouckaert, *supra* note 8, at 378-80.

14. The demise of the Cold War was important because South Africa manipulated Cold War politics to receive United States support. It did so by characterizing the resistance movements within the country and from the countries surrounding it as Marxist. This characterization was part of the National government's ultimate plan to destabilize the resistance movements in the southern African region. *See infra* notes 22-26 and accompanying text.

15. Nelson Mandela was one of the prominent ANC leaders during the resistance movement years. He was jailed by the National Party from the 1960s to the 1990s as a political activist. He served as South Africa's first democratically elected leader from 1994 to 1999.

16. Frederik Willem de Klerk was the leader of the National Party.

17. Bouckaert, *supra* note 8, at 395-97. *See also supra* note 7. (To further explore the negotiation process and the circumstances which led to the collapse of apartheid, see Bouckaert, *supra* note 8; SPARKS, *supra* note 12; and WILLIAM BEINART, *TWENTIETH-CENTURY SOUTH AFRICA* (1994).

After elections placed the ANC in power, the Mandela-led ANC government faced the daunting task of leading South Africa out of the shadows of apartheid and into a democratic and color-blind society by reconstructing South Africa's socioeconomic landscape, focusing on the needs of the non-white South African majority.¹⁸ Reforms were planned in a free-market economy struggling to revive itself after decades of operating under a maligned socioeconomic model; international sanctions diminished the national economy during the latter years of the apartheid regime.¹⁹ Consequently, economic realities significantly hindered the pursuit of reinvigorating the country and realizing ambitious domestic reforms.²⁰

A. South Africa's Destabilization Campaign

The ANC-led government has been forced to address the continuous flow of immigrants into South Africa, pushing government infrastructure to its limits.²¹ Part of South Africa's immigration dilemma may be directly attributed to the apartheid regime's infamous Destabilization Campaign.

To limit opposition to the apartheid regime, the National Party waged a Destabilization Campaign by pursuing a "total [military] strategy" to render a "total onslaught"²² against neighboring countries²³ that were giving refuge to exiled ANC leaders. This Campaign uprooted families from their homes and created a region of asylum seekers in southern Africa,²⁴ while paralyzing the social and economic facilities of South Africa's neighboring states.²⁵ The

18. As part of its ambitious plans, the new government passed land reform laws to equalize the disparity of land held by the previously segregated populations. Bouckaert, *supra* note 8, at 405, (citing AFRICAN NATIONAL CONGRESS, THE RECONSTRUCTION AND DEVELOPMENT PROGRAMME: A POLICY FRAMEWORK (1994)). It also instituted ambitious social programs, such as a national health care system, the construction of a million homes within five years, and a reform of education and training facilities. Brian Nolan, *Poverty, Inequality and Reconstruction in South Africa*, 13 DEV. POL'Y. REV. 151, 161-69 (1995).

19. Bouckaert, *supra* note 8, at 379, 380.

20. *Id.* at 405.

21. Paul Morris, *Tide of Illegal Immigration Strains South Africa*, REUTERS WORLD SERVICE, Jan. 5, 1997, available in LEXIS, World Library, Allword File.

22. Human Rights Watch, *supra* note 5, at ch. III, 4. South Africa implemented its "total onslaught" strategy with military attacks against its neighboring countries, also known as the frontline states, by either supporting rebel groups within the frontline states or sending in South African forces to destabilize the frontline states. *Id.*

23. South Africa's neighboring countries which were sympathetic to the ANC were Angola, Botswana, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia, and Zimbabwe. Human Rights Watch, *supra* note 5, at ch. III, n.22.

24. Human Rights Watch, *supra* note 5, at ch. III, 4.

25. *Id.* The United Nations estimates that South Africa's Destabilization Campaign caused over 1.3

Destabilization Campaign's legacy remains with South Africa because many of those uprooted fled to South Africa, contributing to the overall immigrant population.²⁶ In addition, economic conditions in neighboring countries have added to the immigration influx, as southern Africans migrate to South Africa seeking better social and economic opportunities.²⁷

B. The Immigrant as the Cause of South Africa's Social Woes?

As immigrants continue to enter South Africa, unemployment and crime rates remain high, retarding the government's endeavors to revitalize the economy. Repairing South Africa's economy requires an increase in foreign capital investments and the privatization of inefficient government businesses.²⁸ This, however, may be politically infeasible if unemployment remains at or increases above thirty percent.²⁹ In addition to high unemployment figures, South Africa is confronted with an alarmingly high crime rate.³⁰ As unemployment and crime rates remain high, the economy is shrinking; in the final quarter of the 1998 fiscal year, South Africa's economy fell into a full recession.³¹ Disdain for immigrants—especially working immigrants—has unsurprisingly manifested in a society facing high unemployment, a troubled economy, and rampant crime. Consequently, many

million deaths and over 60 billion dollars worth of damage. UNITED NATIONS CHILDREN'S FUND, CHILDREN ON THE FRONTLINE: THE IMPACT OF APARTHEID, DESTABILIZATION AND WARFARE ON CHILDREN IN SOUTHERN AND SOUTH AFRICA: 1989 UPDATE WITH NEW SECTION ON NAMIBIA, UPDATE 11, 38 (1989).

26. For example, South Africa's activities forced countless Mozambicans to flee to South Africa, where they are now believed to constitute a majority of the immigrant population. Human Rights Watch, *supra* note 5, at ch. III.

27. A large disparity in the standard of living index partly explains the urge to migrate. For example, South Africa's per capita GNP is thirty-five times greater than that of Mozambique. *Southern Africa Dreams of Unity*, ECONOMIST, Sept. 2, 1995, at 35.

28. Privatization may free direly needed capital that can be used to address the country's debt burden which accounted for 20% of the budget in 1996. Christopher Ogden, *The Post-Miracle Phase: Is South Africa On a Roll?*, TIME, Sept. 16, 1996 at 47, 49, available in 1996 WL 10668827.

29. Corinna Schuler, *Black Migrants not Welcome: Rise in Xenophobia*, NAT'L POST, Nov. 20, 1998 (visited Oct. 11, 1999) <<http://www.queensu.ca/samp/publications/poparticles/article16.htm>>.

30. Since 1990, incidences of sexual assault have increased by 81%, vehicle theft by 43%, serious assault by 38%, and murder by 26%. Ogden, *supra* note 28, at 52. South Africa's murder rate, at 46.7 for every 100,000 people, is considered one of the highest in the world. Compare South Africa's crime rate to other countries notorious for high levels of crime: 9.5 for every 100,000 in the United States and 20 for every 100,000 in Russia. Bouckaert, *supra* note 8, at 407 (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1993 13 (1994)).

31. *South Africa Gets More Foreign Investment*, Xinhua News Agency, Feb. 25, 1999, available in LEXIS, World News.

South Africans have concluded that immigrants are committing crimes³² and stealing limited resources from them by taking employment opportunities, housing, and general social welfare.³³

II. XENOPHOBIC HYSTERIA AND HUMAN RIGHTS VIOLATIONS AGAINST IMMIGRANTS

South Africa's troubled domestic environment has led to public criticism of the government. To divert this criticism, South Africa's government officials habitually blame immigrants for the country's social woes, such as the spread of crime, unemployment, and disease.³⁴ These diversionary tactics sanction and nurture a culture of xenophobia.³⁵ Since the democratic elections in 1994, it is clear that xenophobia has been increasing.³⁶ Understanding the cause of that rise remains elusive, especially considering that a majority of South Africans have had little or no contact with immigrants.³⁷ This anomaly

32. Though South Africans believe immigrants are a source of competition for South Africa's limited number of jobs and they depict immigrants as stealing jobs from and committing crimes against South Africans, research contradicts such beliefs by showing no correlation between immigrants and increased crime and unemployment. Instead, the research implicates South Africans as the causal agent for the increased crime rate, with immigrants often being their victims. See South African Migration Project, *Migration News This Week*, BUS. DAY, Jan. 13, 1999 (visited Oct. 11, 1999) <<http://www.queensu.ca/samp/news/1999/jan.htm>>.

33. Liz Sly, *South Africa is the New Lure for Continent's Refugees*, CHI. TRIB., Oct. 9, 1994, § 1, at 1, 20.

34. Suzanne Daley, *New South Africa Shuts the Doors on its Neighbors*, N.Y. TIMES, Oct. 19, 1998, at A6; see also *infra* note 40. To explore the predominant myths of immigration held by South Africans and to analyze the misplaced beliefs that are perpetuating the spread of xenophobia in South Africa, see David McDonald et al., SOUTHERN AFRICAN MIGRATION PROJECT, *Challenging Xenophobia: Myths and Realities of Cross-Border Migration in Southern Africa*, South African Migration Project, MIGRATION POLICY SERIES NO. 7. (An executive summary of the article is available at <<http://www.queensu.ca/samp/publications/policy7.htm>> (visited Oct. 4, 1999)).

35. Daley, *supra* note 34.

36. South African Migration Project, *supra* note 32. Recent surveys partly explain the lack of public outrage for the spread of xenophobia. A 1998 survey taken by the Southern African Migration Project ranks South Africa as possibly the world's most xenophobic nation. Daley, *supra* note 34, at A6. The survey polled 3,500 persons nationally. Crush & Mattes, *supra* note 3. According to those polled, only 6% favored immigrants entering the country while 25% wanted a complete ban on immigration. Estelle Randall, *Refugees in South Africa will have the law on their side. . . Bill in line with the United Nations Policy*, ARGUS, Oct. 31, 1998 (visited Oct. 11, 1999) <<http://www.queensu.ca/samp/publications/poparticles/artic18.htm>> (citing the SAMP survey). These xenophobic sentiments appear to be increasing considering a 9% increase occurred since 1996, when 16% of those polled wanted a complete ban on immigration. Other comparable countries have less than 10% of its population calling for a total ban on immigration. Crush & Mattes, *supra* note 3.

37. Of those polled, 69% of black and 74% of white South Africans claimed that they had little or no contact with immigrants. Interestingly, however, black South Africans appeared more willing to accommodate immigrants: 50% of black South Africans supported the right to vote and access to housing

may be explained by theorizing that South Africans are nurturing their xenophobic sentiments by basing them not upon personal experience but instead upon stereotypes and negatively-charged language that assumes immigrants are a societal bane.³⁸ Research shows that South Africans do not have a clear understanding of immigration matters, partly due to the dearth of data on immigration and its effects on society.³⁹ Notwithstanding this lack of data, it is clear that many South Africans have misplaced fears concerning immigrants,⁴⁰ and the government and general public have developed an animus for immigrants. This animus is manifested by an increasing number of reported violent attacks on immigrants, reflecting South Africa's worsening milieu of xenophobia.⁴¹

A. Official Government Statements

Many immigrants blame the government for perpetuating xenophobic beliefs⁴² and assert that South African politicians have taken immigration policymaking to an "alarmist and ill-informed" level.⁴³ Criticism has focused particularly on the Department of Home Affairs—the government office responsible for South Africa's immigration policies—and its minister, Mangosuthu Buthelezi.⁴⁴ Under Buthelezi, the Department of Home Affairs

for immigrants already in the country, and 66% supported giving immigrants access to medical and education facilities. *Id.* In contrast, only 30% of white South Africans supported giving the aforesaid rights to immigrants. *Id.*

38. *Id.*

39. Daley, *supra* note 34, at A6.

40. Research showed that 48% of South Africans claimed crime and 32% claimed a threat to jobs and the economy as the basis of their animus against immigrants. Disturbingly, 29% mentioned diseases as a cause of fearing immigrants. Crush & Mattes, *supra* note 3.

41. Since 1997, at least thirty immigrants have been murdered in South Africa. South African Migration Project, *Migration News This Week*, SAPA, Dec. 9, 1998 (last modified June 8, 1999) <<http://www.queensu.ca/samp/news/1998/dec.htm>> (citing Barney Pityana, Chairman, South African Human Rights Commission). Also, physical assaults of immigrants have become widespread. Among other incidents, in 1998 near Pretoria a mob of South Africans killed three immigrants, accusing them of stealing South African jobs. Daley, *supra* note 34, at A6.

42. South African Migration Project, *supra* note 32 (citing research conducted by the Centre of Policy Studies).

43. Human Rights Watch, *supra* note 5, at ch. VI, 1.

44. Buthelezi is also the leader of the Inkatha Freedom Party. See David Beresford, *The Streets of the City of Gold Are Paved with Misery: Waves of Illegal Immigrants Find Only Poverty in South Africa*, THE GUARDIAN, Oct. 6, 1994, at 18. Though the Inkatha Freedom party is an opposition party to the ANC, the ANC-led government must work with Buthelezi because it finds itself in a catch-22: it must either support Buthelezi's policies of limiting immigration—to help protect needed resources for South Africans while consequently alienating its neighboring countries—or acknowledge the role its neighbors served in supporting the ANC in its fight against apartheid by liberalizing Home Affairs' immigration policies.

has continually admonished the public about the "hoard" of immigrants "flooding" into the country,⁴⁵ and characterized undocumented immigrants as a danger to South Africa's transformation process.⁴⁶ Buthelezi claims reconstruction and development plans will not be realized unless South Africa stops the flow of immigrants,⁴⁷ and has tried to alienate immigrants by instilling fear into the public. In a speech before South Africa's National Assembly, Buthelezi said, "[i]f we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme."⁴⁸

Official statements by the Department of Home Affairs have negatively affected other government institutions. Police and army officials, after hearing what government authorities advocate, feel legitimized in abusing undocumented immigrants. Significantly, government rhetoric and abusive

Judith Matloff, *Flood of Illegals Stymies a New South Africa*, CHRISTIAN SCI. MONITOR, Jan. 5, 1995, at 7. Faced with this dilemma, South Africa has chosen (not surprisingly) to protect its own citizens by supporting the policies of the Department of Home Affairs. Kevin Tessier, *The Challenge of Immigration Policy in the New South Africa*, 3 IND. J. GLOBAL LEGAL STUD. 255, 256 (1995).

45. Agreeing upon the precise number of immigrants in South Africa is difficult since reliable evidence and research is presently lacking. See Hassan Lorgat, *The Rising Tide of Xenophobia is Sweeping Away Our Rationality—and Humanity*, SUNDAY INDEP., Dec. 6, 1998 (visited Oct. 11, 1999) <<http://www.queensu.ca/samp/publications/poparticles/artic21.htm>>; see also *supra* note 2. Those critical of the government's estimates note that they are mere guesses which the South African government irresponsibly and erroneously espouses and disseminates to the general public. Daley, *supra* note 34, at A6. For those more hesitant to rely on popular projections, an educated guess of the undocumented immigrant population may be between 500,000 and 1.5 million. Jonathan Crush, *Exaggerated Figures Are Creating a Xenophobic Atmosphere*, BUS. DAY, June 30, 1997 (visited Oct. 4, 1999) <<http://www.queensu.ca/samp/publications/Artic15.htm>>.

46. The transformation process is outlined in the ANC's optimistic Reconstruction and Development Program. See Human Rights Watch, *supra* note 5, at ch. VI, 1.

47. *Id.* In a 1997 budget speech, Minister Buthelezi "reasoned:"

With an illegal population estimated at between 2.5 to 5 million, it is obvious that the socio-economic resources of the country, which are under severe strain as it is, are further being burdened by the presence of illegal aliens. The cost implication becomes even clearer when one makes a calculation suggesting that if every illegal [immigrant] costs our infrastructure, say 1000 rand [\$200] per annum, then multiplied with whatever number you wish, it becomes obvious that the cost becomes billions of rand per year.

Id.

48. *Id.* at ch. III, 2 (citing Minister of Home Affairs: Introductory Speech, Budgetary Appropriation, August 9, 1994). Realizing the political potency of the undocumented immigrant issue, minority parties have continually elevated their calls for the ANC-led government to take action. Conservative opposition parties such as the Freedom Front and the National Party have called for greater government attention to illegal immigration. The Freedom Front has said it will support "all measures" to fight illegal immigration while the Inkatha Freedom Party has threatened to have organized marches and take "physical action" if the government fails to respond properly. *Id.* at ch. VI, 1.

police conduct not only ensure that xenophobia will thrive, but also implicitly sanction the public to adopt xenophobic beliefs and take violent action.⁴⁹

Xenophobia has created a hostile environment for immigrant workers who are particularly vulnerable to the prejudice of South African officials and employers. Because of their illegal status, undocumented immigrants must "accept employment whatever the payment, risk, physical demand, or working hours involved."⁵⁰ South African employers can exploit the undocumented immigrant because of her illegal status; hence, seeking legal recourse often may not be a viable option for the immigrant without risking police arrest, detention, repatriation, and attendant beatings.⁵¹ Cognizant of their superior position, South African employers routinely assault and defraud their immigrant employees.⁵²

B. Police Complicity and Detention Methods

For the immigrant population, seeking redress from the police is not a viable option. In addition to acting in complicity with South African

49. See generally Lorgat, *supra* note 45.

50. Human Rights Watch, *supra* note 5, at ch. IV, 1 (quoting Maxine Reitzes, *Alien Issues*, 12(1) INDICATOR SA, 1994, at 7-11). The immigrant worker labors for a minuscule amount compared to South African standards, earning on average 5 to 10 rand per day—the U.S. equivalent of \$1 to \$2. See *id.* at ch. I, 2. Of all jobs, the exploitation of undocumented immigrants is most common in the farming industry. See *id.* at ch. IV, 1.

51. To support its rhetoric of removing all undocumented immigrants from South Africa, the Department of Home Affairs, in conjunction with police and community organizations, has implemented a repatriation campaign—a program intended to locate and expel from South Africa as many undocumented immigrants as possible. The repatriation program has grown in direct correlation to the growth of xenophobia—in 1988, South Africa repatriated 44,225 persons and the figure increased to 96,600 in 1993; 180,713 in 1996; and 176,351 in 1997. *Id.* at ch. III, 2. Most of those who were removed were citizens of South Africa's neighboring countries, with Mozambicans constituting the overwhelming majority. *Id.*

52. A popular ploy used by South African employers is to hire immigrants for a period of time, and then, to avoid paying them, inform the local police or immigration office to have the immigrant worker repatriated. *Id.* at ch. I, 2. Though the Aliens Control Act technically prohibits and sanctions employing illegal immigrants, few charges or prosecutions actually occur. In some cases there seems to be a close degree of collaboration between the employers and police. See generally *supra* note 5. One high ranking police official claims that political interference has made it difficult to prosecute employers: "We started prosecuting the farmers, but it's a big fight. It's a political issue. If we charge the farmers, they turn against the government. So higher up, they don't want us to charge the farmer." Human Rights Watch, *supra* note 5, at ch. IV, 2.

employers, immigrants accuse the police of physically abusing them when they seek assistance, and of capriciously arresting and repatriating them.⁵³

Community organizations, formed for the purpose of bringing undocumented immigrants to the police for repatriation, support the authorities.⁵⁴ Informal organizations have arisen to heed Minister Buthelezi's 1994 call for the South African public to report suspected, undocumented immigrants.⁵⁵ Community organizations have created "community laws" for detecting and arresting suspected immigrants.⁵⁶

Many immigrants accuse the formal and informal units responsible for detecting undocumented immigrants of being arbitrary and abusive. The procedures for identifying undocumented immigrants rely on generalized stereotypes, such as the color of one's skin, the presence of vaccination marks, the degree of one's accent, and the level of one's general knowledge of the

53. Desmond Lockey, a member of Parliament and the chairman of the Parliamentary Portfolio Committee on Home Affairs, said that local persons in his district of Winterveld had in the past colluded with police to loot the property of immigrants by having immigrants repatriated. *Id.* at ch. 1, 6 (citing interview by the HUMAN RIGHTS WATCH with Desmond Lockey, M.P., Cape Town, S. Afr. (Dec. 9, 1997)).

54. *Id.* at ch. IV, 3.

55. ANTHONY MINNAAR & MIKE HOUGH, WHO GOES THERE?: PERSPECTIVES ON CLANDESTINE MIGRATION AND ILLEGAL ALIENS IN SOUTHERN AFRICA 184 (1996). The police have followed suit by advertising "crime-stop" numbers to call-in undocumented immigrants and sometimes have offered monetary rewards. Human Rights Watch, *supra* note 5, at ch. IV, 4. Critics have accused the Department of Home Affairs of actively participating in this process with the police:

There has been a document issued by the Department of Home Affairs urging the locals to report any Mozambican to the police. It was sort of an underhanded activity, and they were not up-front about it since it was not an official document.

But I know it was a police number you had to dial to. There was an unclear Home Affairs seal, and it indicated the reward was fifty rands [\$10] per illegal alien.

Id. at ch. IV, 4 (citing interview by the HUMAN RIGHTS WATCH with an informant, Orlando West neighborhood of Soweto, S Afr. (Aug. 17, 1996)).

56. For example, the African Chamber of Hawkers and Independent Businessmen [ACHIB] has created committees to identify foreign hawkers to prevent them from engaging in trade in Johannesburg and have coordinated their policy with the South African police. *Id.* at ch. IV, 4 (internal citation omitted). The ACHIB believes that 40% of all hawkers are foreign, and that they are responsible "for rising crime, overpopulation, falling wages and trading stolen, rotten and expired goods." *Id.* at ch. VI, 1-3. Though 20% of all foreign hawkers create employment for South African citizens (*See* Schuler, *supra* note 29), some community organizations have called for boycotting foreign hawking businesses and South African businesses that use immigrants, and threatened to take vigilante action against foreign hawkers. Human Rights Watch, *supra* note 5, at ch. VI, 1-3.

political world.⁵⁷ Failure to cooperate with the police may result in wrongful arrest and detention.⁵⁸

After arresting the suspected undocumented immigrant, an official may abuse her power by threatening to repatriate the arrested person, who upon arrest is considered a detainee. Immigrants allege that police and Home Affairs officials extort money from them in order to grant releases from prison or detention centers, even after the immigrant has proven her legal status as is necessary to remain in South Africa.⁵⁹ If the official cannot extract money immediately from the detainee, the official may prolong the detainee's date of release in order to extort the money.⁶⁰ If extortion is ultimately unsuccessful, the detainee may be physically abused and repatriated.⁶¹ Many immigrants are unsurprisingly reluctant to press charges for the long detention terms they must endure while waiting for their cases to move through the judicial process.⁶² This reluctance to press charges reinforces the pattern of police abuse and brutality.⁶³

III. UNCONSTITUTIONALITY OF THE ACA

Not surprisingly, the proliferation of xenophobia and the concomitant increase of violence against immigrants have failed to subside while the ACA,⁶⁴ the cornerstone of South Africa's immigration policy, has been in force. Critics of South Africa's immigration policy note that the ACA

57. MINNAAR & HOUGH, *supra* note 55, at 90-91.

58. Wrongful arrests often occur when the arresting authority, after requesting identification papers, destroys them because she believes the documents are fraudulent. Also, when a person fails to produce proper identification papers, but insists they are at home, the authority is obligated to go with the person to retrieve the papers. However, rarely do the authorities do so; instead, they often arrest the person on the spot. Human Rights Watch, *supra* note 5, at ch. IV, 5-7.

59. *Id.* at ch. IV, 8.

60. *Id.* at ch. IV, 8. Abuse is especially rampant and authorities commonly commit violations against a detained undocumented immigrant because little oversight has been instituted or practiced in detention centers. Officials have been known to hold detainees ranging from several days to over one year, depending upon how long it takes to determine the detainee's legal status, and if necessary, the time to repatriate the detainee. *Id.* at ch. IV, 8-11. Though detention times may vary, according to legislation, police must inform detainees of the reason for the detention after forty-eight hours; within thirty days, a judge of the High Court must review the case. See Aliens Control Act (Act 96 of 1991) §§ 52, 55.

61. In just the first six months of 1998, the Independent Complaints Directorate, a body created to monitor and curtail police brutality, received 480 complaints of deaths occurring while in police custody or as a result of police aggression. SOUTH AFRICA, HUMAN RIGHTS WATCH WORLD REPORT 70-71 (1999); see also Human Rights Watch, *supra* note 5, at ch. IV.

62. Human Rights Watch, *supra* note 5, at ch. IV.

63. *Id.* at ch. IV, 9.

64. See *supra* note 5.

conflicts with the protections embodied in the 1996 Constitution, particularly its Bill of Rights. This section will review the rights immigrants may invoke under the 1996 Constitution; explore the ACA provisions which sanction arresting, detaining, and repatriating immigrants; and analyze those provisions in light of the guarantees in the 1996 Constitution.

A. *The 1996 Constitution*

The 1996 Constitution expansively delineates the rights of immigrants, shielding them from unconstitutional conduct and human rights violations. In drafting the Constitution, the democratically elected South African government wanted to create a progressive instrument which would give liberal protections to citizens and non-citizens alike. South Africans believed it was necessary to endow each person with broad political rights to prevent apartheid-like violations from occurring again.⁶⁵ At its inception, the 1996 Constitution achieved its goal and was heralded for its progressiveness. The Constitution's Bill of Rights gave all persons fundamental and procedural protections.

The Bill of Rights recognizes fundamental rights for all persons by "enshrin[ing] the rights of all people in [the] country and affirm[ing] the democratic values of human dignity, equality and freedom."⁶⁶ The right to *human dignity*, wherein "everyone has inherent dignity and the right to have their dignity respected and protected,"⁶⁷ supports the broad delineation of fundamental rights. The most important fundamental right is encapsulated in the right to *equality*, which guarantees legal equality and protection from discrimination.⁶⁸ Giving substance to fundamental rights, the Bill of Rights guarantees *all* persons the right to a safe environment;⁶⁹ adequate housing;⁷⁰

65. Human Rights Watch, *supra* note 5, at app. A, 6. See also Peter N. Levenberg, *South Africa's New Constitution: Will it Last?*, 29 INT'L LAW. 633, 648 (1995).

66. S. AFR. CONST. ch. II, § 7(1)(1996). It also enjoins the State to "respect, protect, promote and fulfill the rights in the Bill of Rights." *Id.*

67. *Id.* at ch. II, § 10.

68. Levenberg *supra* note 65, at 646 (citing S. AFR. CONST. ch. III, § 8(1)(1993)). See also S. AFR. CONST. ch. II, § 9 (1996). Section 9, the right to equality, states:

Everyone is equal before the law and has the right to equal protection and benefit of the law [where] the state [will] not unfairly discriminate directly or indirectly against anyone on one or more of the following grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, belief, culture, or birth.

69. S. AFR. CONST. ch. II, § 24 (1996).

70. *Id.* at ch. II, § 26.

property;⁷¹ education;⁷² and health care and sufficient food, water, and social security.⁷³

South Africa's Bill of Rights gives procedural protections to *all* persons. Section 12 provides that the "freedom and security of the person" secures the right to "not be deprived of freedom arbitrarily or without just cause," to "not be detained without trial," to "not be treated or punished in a cruel, inhumane, or degrading way," and to be "free from violence from both public and private sources."⁷⁴ Upon arrest, any person may invoke the right to have "just administrative action," which mandates "administrative action which is lawful, reasonable and procedurally fair,"⁷⁵ and gives that person the right to have written notice of any adverse decision against her, as well as judicial review of administrative decisions.⁷⁶ For detainees, Section 35 lists multiple protections, including the right to be informed of the basis for detention, to consult with a legal consultant or to have one assigned, to challenge the detention before a court, and to be detained only in conditions consistent with human dignity.⁷⁷

71. *Id.* § 25.

72. *Id.* § 29.

73. *Id.* § 27.

74. *Id.* § 12(1).

75. *Id.* § 33.

76. *Id.* See also Human Rights Watch, *supra* note 5, at app. A, 6.

77. S. AFR. CONST. ch. II, §§ 35(1)(d)-(f) to 35(2). The rights of *arrested, detained, and accused persons* are:

- (1) Everyone who is arrested for allegedly committing an offence has the right . . .
 - (d) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right—
 - (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state

B. The ACA

The ACA is ultimately a remnant of a past age that contradicts the rights and principles reflected in the 1996 Constitution and its Bill of Rights. The cornerstone of the ACA is the *prohibited person* definition which subsumes, among others, any person who enters the country by improper means,⁷⁸ who is an "undesirable,"⁷⁹ or who has been previously repatriated or ordered to leave.⁸⁰ This definition permits the government to deny entry not only to persons who are illegally present in South Africa, but also to those who may become public charges, such as individuals "deemed by the Minister to be an undesirable inhabitant of or visitor to the republic," individuals who have committed crimes, or individuals who suffer from mental illness or are afflicted with a disease.⁸¹ The government may arrest, detain, and repatriate any person to whom prohibited person status attaches.⁸²

To avoid being declared a prohibited person, the ACA requires all immigrants to report to an immigration officer at a designated port of entry.⁸³ Failure to satisfy the prerequisites for entry or to convince the officer of lawful entry status requires that officer to deny entry.⁸⁴ If an immigrant is in South Africa without a residence permit, she is required to disclose this fact to an immigration officer.⁸⁵ Failure to do so leaves her vulnerable to arrest without a warrant and being repatriated if a warrant is issued by the minister.⁸⁶

expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counselor; and

(iv) chosen medical practitioner.

78. Improper entry means entering South Africa through non-designated ports of entry, not reporting to immigration officers, entering without a visa, or failing to produce satisfactory documents upon request. See Aliens Control Act (Act 96 of 1991) §§ 5, 6, 7 and 9(1).

79. *Id.* § 39(2).

80. *Id.*

81. *Id.* § 39(2). Prohibited person status also attaches to those who stay longer than permitted by their residence permits. *Id.* § 26(5).

82. *Id.* § 44.

83. *Id.* § 7.

84. *Id.* § 9.

85. *Id.* § 27.

86. *Id.* Three groups of persons are excepted from the general "prohibited person" rule: first, persons with desirable skills; second, contract workers; and third, asylum applicants and refugees. See *id.* §§ 25, 26, 29 and 40.

The ACA confers immigration officers with extensive powers to find, arrest, detain, and repatriate undocumented immigrants. Immigration officers may require any person⁸⁷ to produce “documentary or other evidence relative to his claim to enter or be in the [R]epublic,” and such power to do so can be over “any . . . person who in the opinion of such officer is not entitled to be in the Republic.”⁸⁸ Section 53 of the ACA empowers immigration and police officers with the right to demand identification papers from those suspected on “reasonable grounds” of being an undocumented immigrant.⁸⁹ Failure to convince the inquiring officer of one’s legal status allows the officer to arrest and detain a suspect until further investigation of that suspect’s status is completed. Though a detainee may not be deemed a prohibited person, if the arresting authority can “establish” that the detainee is unlawfully in the country or has committed an offense, then the authority may repatriate that detainee.⁹⁰ Section 44 of the ACA mandates the repatriation of those who are *declared*⁹¹ or *deemed*⁹² to be prohibited persons. Immigration officers may also arrest any prohibited person in the country without cause or a warrant, and can also remove that person with a warrant issued from the Minister.⁹³

1. *The Unconstitutionality of the ACA*

The ACA overzealously allocates power to immigration authorities who have subsequently abused their powers by infringing upon the constitutional

87. The Aliens Control Act applies to both non-citizens *and* citizens.

88. This leaves immigration officers in a powerful position; an immigration officer may deem both immigrants and citizens to be prohibited persons. *Id.* § 7(1). Failure to convince the immigration officer of one’s right to be in the country gives the officer the power to repatriate the suspected immigrant. *Id.* § 9.

89. *Id.* § 53(1).

90. *Id.* § 53(2).

91. See Jonathon Klaaren, *Is Constitutionality Catching?: A Survey of South African Immigration Legislation and Some Constitutional Issues*, forthcoming in *THE ALIENS CONTROL ACT: A REVIEW AND A CRITIQUE* 6 (J. Crush & R. Mojapelo eds., 1996) (visited Oct. 4, 1999) <<http://pantheon.yale.edu/~jklaaaren/crush6fn.asc>> (citing Aliens Control Act (Act of 1996) § 9).

92. See Aliens Control Act (Act 96 of 1991) § 39. See also Klaaren, *supra* note 91, at 6. One may be considered a prohibited person—even though she may not have been formally declared a prohibited person—if that person violates certain Aliens Control Act provisions. For example, a person is deemed a prohibited person if she fails to obey an order to leave, making her subject to removal if the Minister of Home Affairs issues a warrant. See Aliens Control Act (Act 96 of 1991) § 10(5)(b)(ii).

93. *Id.* § 44. In addition to § 44, repatriation can occur even when one has not been declared a prohibited person. For example, the government can repatriate an immigrant for violating the conditions of her provisional permit (*id.* § 10(5)(b)), committing a criminal offense (*id.* §§ 43 and 44(2)), or residing in the country without a permit (*id.* § 27(3)). Moreover, the Minister of Home Affairs may unilaterally decide to repatriate a person without first having to declare that person a prohibited person if the Minister believes the repatriation would be in South Africa’s best interests. *Id.* § 47(1).

rights of immigrants. The broad, loosely constructed definition of a *prohibited person* may be constitutionally infirm because it is vague and overstated. The *prohibited person* definition subsumes certain groups of disabled persons which consequently may conflict with the Constitution's prohibition of discriminating against the disabled.⁹⁴ Also, assigning prohibited person status upon those who engage in prostitution,⁹⁵ and upon persons the government ambiguously and capriciously deems as "undesirables" may violate equal protection rights on grounds of gender⁹⁶ and freedom of expression,⁹⁷ respectively. In each case, the ACA violates the express language of the right to equality by singling out, and thus discriminating against, minority and ostracized groups such as disabled persons, former prostitutes, or "undesirable" persons.⁹⁸

Current arrest procedures also may not pass constitutional scrutiny because they are manipulable and inconsistently enforced. The practice of arbitrarily accosting people to demand identification papers on the basis of their race or nationality clearly violates the right to equality under Section 9 of the 1996 Constitution.⁹⁹ Similarly, the police practice of identifying suspected immigrants on the basis of language, accent, or identifying marks would likely be deemed unconstitutional.¹⁰⁰

As a result of ACA's overall incongruity, police and immigration officials have too much discretion in pursuing their responsibilities. For example, though police usually are required to obtain a warrant to search a person or premise lawfully, the officer may ignore this requirement if she reasonably believes that a warrant would be given, and that any delay would circumvent the warrant's utility.¹⁰¹ Giving such discretion to the police has not yet been challenged, but at a minimum, it is questionable whether exempting the warrant requirement is constitutional under a privacy analysis.¹⁰²

94. Klaaren, *supra* note 91, at pt. I (E), para. 3 (internal citation omitted). See also 1996 Constitution. S. AFR. CONST. (1996) ch. II, § 9(3).

95. See Aliens Control Act (Act 96 of 1991) § 39.

96. S. AFR. CONST. (1996) ch. II, § 9.

97. Klaaren, *supra* note 91, at pt. I(E), para. 3 (internal citation omitted). See also S. AFR. CONST. (1996) ch. II, § 16.

98. See Aliens Control Act (Act 96 of 1991) § 39 and *supra* text accompanying note 68.

99. Klaaren, *supra* note 91, at pt. I(H), para. 5. See also S. AFR. CONST. (Constitution Act 200, 1993 ch. II, § 9).

100. Klaaren, *supra* note 91, at pt. I(H), para. 3. See also S. AFR. CONST. (1996) ch. II, § 9. The right to Privacy in § 14, Freedom and security of the person in § 12, and Human dignity in § 10 may also be applicable. See S. AFR. CONST. (1996).

101. Aliens Control Act (Act 96 of 1991) §54(8).

102. Klaaren, *supra* note 91, at 9. The right to Privacy in § 14 of the 1996 Constitution says:

The ACA's Section 53(1) "reasonable suspicion" standard, which vests immigration and police officers with the right to arrest, detain, and repatriate persons—for both declared and non-declared prohibited persons¹⁰³—may be facially-invalid because it is overly-inclusive and arbitrary.¹⁰⁴ Section 53 may be overly-inclusive because it allows government authorities to approach and question persons based on their alien status, or more specifically, their appearance of being an immigrant. The reasonable suspicion standard should relate to the status of an immigrant unlawfully in the Republic, rather than just the immigrant's appearance.¹⁰⁵ In addition, this reasonable suspicion standard may be arbitrary because it gives inadequate instructions as to how to judge properly the basis for generating a reasonable suspicion. Without clear guidelines, the standard may violate the right to "freedom and security of the person."¹⁰⁶

a. The Detention Process

Throughout the detention process, immigrants must weather unlawful and prolonged detention periods, beatings, extortion attempts, and squalid facilities.¹⁰⁷ The Constitution protects immigrants from government abuse by recognizing their rights to be treated with dignity,¹⁰⁸ equality,¹⁰⁹ and to be free

"Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed." S. AFR. CONST. (1996) at ch. II, 14.

103. I use the term "non-declared prohibited person" synonymously with "deemed prohibited persons." See *supra* notes 91 and 92 and accompanying text.

104. Aliens Control Act (Act 96 of 1991) § 53(1) reads:

If any immigration officer or police officer suspects on reasonable grounds that a person is an alien he may require such person to produce to him proof that he is entitled to be in the Republic, and if such person fails to satisfy such officer that he is so entitled, such officer may take him into custody without a warrant and if such officer deems it necessary detain such person in a manner and at a place determined by the Director-General, and such person shall as soon as possible be dealt with under section 7.

105. Jonathan Klaaren, *Draft: Legal Issues Re: The Arrest and Detention of Undocumented Migrants, A Human Rights Commission Enquiry Working Paper* (visited Oct. 4, 1999) <<http://www.law.wits.ac.za/docs/arrest2.htm>> [hereinafter Klaaren Draft].

106. S. AFR. CONST. (1996) ch. II, § 12. However, if the questioning of a suspect is considered to be a "trivial or temporary" intrusion of liberty, then the freedom and security right may not be applicable. Klaaren Draft, *supra* note 105, at 8.

107. See generally, Human Rights Watch, *supra* note 5, at ch. IV, 8-20.

108. S. AFR. CONST. (1996) ch. II, §§ 7 and 10.

109. *Id.* at ch. II, § 9.

from violence, torture, and cruel, inhumane, and unusual punishment while in detention.¹¹⁰ Though Section 44(1)(a) of the ACA allows the government to detain a person pending a repatriation determination, Section 55 places limits on the manner of detention.¹¹¹ Immigration officers may detain any suspected "prohibited person" for forty-eight hours, and may continue to detain her for successive forty-eight hour periods "for as long as may be reasonable and necessary"¹¹² to determine her legal status.¹¹³ The immigration officer should give the detainee a written explanation for holding her beyond the first forty-eight hours.¹¹⁴ This rarely happens.¹¹⁵ Once a detainee is subject to repatriation, the forty-eight hour time limit does not apply, and an immigration officer can hold her for an additional thirty days after determining her illegal status pending repatriation.¹¹⁶ These practices conflict with the express language of Section 35 of the 1996 Constitution, which mandates that a detainee be informed of the basis of arrest and detention, be given a hearing in court within forty-eight hours after the time of arrest, and be detained in facilities which conform to standards of human dignity.¹¹⁷

b. The Repatriation Process

The practice of repatriating immigrants may violate constitutional guarantees when officials manipulate the inconsistent burden of proof rules contained in the ACA. It is unclear who bears the burden for proving citizenship status where an immigrant seeks to avoid being repatriated.¹¹⁸ In practice, because of the ACA's ambiguities, the burden is often placed upon the detainee.¹¹⁹ Doing so may be unconstitutional since officials may not give the detainee a real opportunity to procure the necessary documents, use telephones, or contact friends, family, and legal assistance in an effort to prove her identity.¹²⁰ Additionally, placing the burden on the detainee may be

110. *Id.* at ch. II, §§ 12 and 35. *See also supra* note 77.

111. Human Rights Watch, *supra* note 5, at app. A, 8.

112. Aliens Control Act (Act 96 of 1991) § 55.

113. *Id.* at § 55(3)(c); Klaaren, *supra* note 91, at 8.

114. Aliens Control Act (Act 96 of 1991) § 55.

115. If one is held for more than thirty days without a determination of legal status, the detention must be reviewed by the High Court. Human Rights Watch, *supra* note 5, at app. A, 8.

116. A court must review any detentions that exceed thirty days. *Id.* *See also* Aliens Control Act (Act 96 of 1991) § 55(5).

117. S. AFR. CONST. (1996) ch. II, § 35. *See also supra* note 77.

118. Klaaren, *supra* note 91, at 7.

119. *Id.*

120. *Id.* at 8-9.

unconstitutional because, by analogy, requiring a defendant in a criminal case to satisfy the burden is unconstitutional¹²¹ since the state exercises significant governmental power in such a proceeding. Because declarations of “prohibited person” status or repatriation proceedings (proceedings over which the state exercises significant power and control) involve lengthy detention periods, placing the burden of proof on the individual may also violate one’s constitutional right to fair procedure.¹²²

The ACA circumvents a detainee’s right to administrative and judicial review. If an immigration officer determines that a detainee is a prohibited person, challenging that officer’s conclusion by obtaining an independent review may be difficult and unconstitutionally denied when no prohibited person declaration is actually made, or when there is no formal right of judicial appeal.¹²³ Arguably, such practice is contrary to the 1996 Constitution’s guarantees of just administrative action,¹²⁴ access to courts,¹²⁵ and the right to appeal.¹²⁶ Though the ACA requires an immigration official to inform a detainee—in writing and within three days of being declared a prohibited person—of her right to request ministerial review,¹²⁷ this right is rarely exercised because most detainees are never “declared” prohibited persons. Instead, they are only treated as such in practice.¹²⁸ In the absence of a provision requiring the government to explain the basis of a prohibited person declaration, it is questionable whether the right to request ministerial review is procedurally constitutional when the declared prohibited person is detained or repatriated without the right to appeal or administrative review.¹²⁹

121. *Id.* (citing *S v. Zuma*, 1995 (2) SALR 641 (CC)).

122. S. AFR. CONST. (1996) ch. II, § 33.

123. The South African Parliament rescinded the statutory right for judicial review in 1991. Klaaren, *supra* 91, at 15, (internal citation omitted).

124. S. AFR. CONST. (1996) ch. II, § 33.

125. *Id.* at § 34.

126. *Id.* at § 35. See also *supra* note 77.

127. Aliens Control Act (Act 96 of 1991) § 52(1).

128. According to the Human Rights Watch interviewees, no deportee or immigration officer was aware of these procedures and could not recall when a “declaration” or a review of a declaration had ever occurred. Human Rights Watch, *supra* note 5, at app. A, 8.

129. Klaaren, *supra* note 91, at 5. See also, S. AFR. CONST. (1996) ch. II, § 33(1). Relatedly, the right to request review and appeal of a prohibited person declaration may violate a separation of powers guarantee, where the same officer who investigated the suspected immigrant’s status should not also determine the prohibited person status for that immigrant. Klaaren, *supra* note 91, at n.27 (citing *Marcello v. Bonds*, 349 U.S. 302 (1955) (prohibiting immigration officers from serving as judges in a case where they have acted as the investigator)). However, the government may easily overcome this constitutional challenge if it actually refers the matter to the Minister for review or appeal. *Id.*

Even when a detainee has the right to have her case reviewed, the review is often ineffectual. The ACA gives those persons who are subject to repatriation, both those who have and have not been declared a prohibited person, the right to request review by the Minister of Home Affairs.¹³⁰ However, it is unlikely that the Minister will actually review and decide in favor of the petitioner—against the Minister's own department.¹³¹ Also, though the ACA does not give detainees the right to administrative review or appeal, it grants the right to judicial review from the High Court to both declared and non-declared prohibited persons subject to repatriation.¹³² However, this means of relief is often impractical for those subject to repatriation since the timing of judicial review often lags far behind the time the repatriation process requires.¹³³

In summary, the ACA principles and the procedures for implementing those principles patently conflict with the 1996 Constitution. Despite the apparent unconstitutionality of the ACA and the enforcement of its provisions, the government has embraced the ACA and disavowed its responsibility to treat immigrants in accordance with the Bill of Rights.

IV. THE JUDICIARY AS THE VANGUARD

South Africa's immigration goals to arrest, detain, and repatriate all undocumented immigrants is fraught with unconstitutional procedures. The immigration policy, in conjunction with the ACA (itself a target of constitutional inquiry), stands in stark contrast to the foundations of the progressive 1996 Constitution. Formulating an immigration policy which conforms to the 1996 Constitution has been troublesome, as a wave of xenophobia has spread throughout the country. As South Africa's domestic environment continues to struggle, government action has only exacerbated the problems in its immigration policies. Police and immigration officials

130. Aliens Control Act (Act 96 of 1991) § 52(1).

131. Klaaren Draft, *supra* note 105, at 12. Also, even before a request for review reaches the Minister, the immigration officer can throw out the appeal submission if the officer believes that the appeal is not well-founded. *Id.* (citing Aliens Control Act (Act 96 of 1991) § 53(1)).

132. Still, even if High Court review is technically available, one's right to enter the court room under § 34 of the 1996 Constitution (the right to have access to courts) may be violated if no independent tribunal is given. Klaaren Draft, *supra* note 105, at 12. If High Court review is given, High Court decisions may be appealed to the next and highest court in South Africa, the Constitutional Court. Constitutional Court of South Africa (last modified April 24, 1998) <<http://www.law.wits.ac.za/court/court.htm#info>>.

133. Even if timing were not a problem, most persons awaiting repatriation do not have the financial means to contest these actions in the High Court. Klaaren, *supra* note 91, at 8.

manipulate applicable law and abuse immigrants, while the Department of Home Affairs continues to espouse the ACA and disseminate xenophobic rhetoric, implicitly giving state recognition to abusive practices.

Though the police and general public cannot be relied upon to eradicate the practice of abusing immigrants, the South African government clearly has the power, through its Parliament, to reform itself and its immigration policies. Advocates for reform had hoped that the summer 1999 presidential elections, which brought Thabo Mbeki of the ANC into power, would precipitate immigration policy reform. However, the *White Paper on International Migration*¹³⁴ (White Paper), proposed for legislation, reveals that reform is not on the horizon as South Africa plans to continue pursuing its repatriation policy in accordance with the ACA.

The White Paper does not appear to fundamentally change immigration policy or address South Africa's xenophobia concerns. In light of the xenophobic atmosphere in South Africa, the White Paper's recommendation to shift enforcement procedures of undocumented immigrants from South Africa's borders to its communities is particularly disturbing.¹³⁵ The White Paper advocates stronger collaboration between immigration officials and South African communities to "ensure that illegal aliens are not harbored within the community," and calls for "checking, in cooperation with the community [to ensure] illegal aliens are [not] receiving services from banks, hospitals, schools, and providers of water supply or electricity."¹³⁶ The White Paper sees this close collaboration with the communities as a means for retarding undocumented immigration by creating "the perception that South Africa is not a good receptacle of illegal immigration."¹³⁷ Though the White Paper claims it is concerned about the rise of xenophobia, it is difficult to foresee how governmental plans to integrate the public in its campaign to make South Africa as inhospitable an environment as possible for

134. A. S. Mokena, *White Paper: International Migration* (last modified March 31, 1999) <<http://www.gov.za/whitepaper/1999/migrate.html>> [hereinafter *White Paper*]. The South African cabinet approved the White Paper in March 1999. The White Paper proposes to create an Immigration Service section within the Department of Home Affairs. This new section would pursue two main policies: first, to provide greater means of moving in and out of the country, and second, to focus upon internal enforcement of undocumented immigrants.

135. *Id.* at § 11 ¶ 2.1.1.

136. *Id.* at § 6 ¶ 5.3.

137. *Id.*

undocumented immigrants will decrease negative stereotypes and abuse of immigrants.¹³⁸

Considering the government's newest policy formulation for its troubled immigration system, it is doubtful that the government will be on the vanguard of mitigating the abuses from which immigrants suffer. While voters continue to perceive immigrants as a threat and social pariah, and politicians pander to the voters' stereotypes of immigrants, it is unlikely that any real reform will materialize, or that xenophobic beliefs will soon dissipate as a result of government initiatives.

A. Recent Decisions as a Source of Optimism for the Future

If the police, general public, and government cannot be relied upon to address South Africa's immigration and xenophobia problems, the judiciary remains the only viable entity to which immigrants can petition to have their constitutional rights fully recognized. Since the government has failed to fulfill its responsibility to address the needs of immigrants through legislation, South African courts have stepped in to slowly build a foundation of rights for immigrants in several high profile cases against the very institution creating immigration policy—the Department of Home Affairs.

A court specifically noted that immigrants could rely upon the Bill of Rights for relief. In *Handmaker v. Minister of Home Affairs*,¹³⁹ the court ruled that the Department of Home Affairs could not expel two immigrants who were waiting to have the Minister of Home Affairs review their applications to extend their work permits.¹⁴⁰ Courts have also bolstered specific substantive rights. In *Johnson v. Minister of Home Affairs*,¹⁴¹ an immigrant-detainee petitioned the High Court to affirm his right to request ministerial review. The Court granted the request, and in ruling that the petitioner was not a prohibited person, the Court reproved the government for not complying

138. The Immigration Service section will be responsible for inspecting schools, workplaces, and service providers in their pursuit to locate undocumented immigrants. Vincent Williams, *Spot the Alien*, 3 CROSSINGS, no. 2, June 1999 (visited Oct. 5, 1999) <<http://www.queensu.ca/samp/crossings/vol3no2/vol3no2.htm>>.

139. *Handmaker and Another v. Minister of Home Affairs*, No. 11794/98 TPD, (May 20, 1998) (unreported).

140. Jonathan Klaaren, *Courts Take a Stand Against Home Affairs*, 3 CROSSINGS, no. 1, January 1999 (visited Oct. 5, 1999) <<http://www.queensu.ca/samp/crossings/vol3no1/vol3no1.htm>>.

141. *Johnson v. Minister of Home Affairs and Another*, 1997 (2) SALR 432 (CPD).

with ACA procedures.¹⁴² In *Larbi-Odam v. MEC for Education*,¹⁴³ the Constitutional Court struck down a provincial law which prohibited immigrants from taking permanent teaching posts in state schools. The Court applied the equality clause of the Interim Constitution to rule that the Bill of Rights' non-discrimination clause requires that all employment opportunities (except those reserved for politically-sensitive information) should be available for both citizens and non-citizens.¹⁴⁴

CONCLUSION

Judges may not always be comfortable making law with their rulings, but because of the government's intransigence to initiate changes, particularly by the Department of Home Affairs, immigration reform through the judiciary has become a necessity, at least for the immediate future. South Africa's policies and actions to control immigration can be inhumane, violative, and unconstitutional to immigrants. The requisite degree of immigration reform, however, may not come easily or quickly. South Africa still faces many social problems, including a large segment of unemployed persons, proportionally high crime rates, and a need to heal the scars left behind by the specter of violence from the apartheid years. Nevertheless, as recent judicial decisions indicate, there is a basis for optimism for the future of immigrants as evidenced by the Constitutional Court's recognition as to why immigrants' rights should be bolstered:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic

142. *Id.* at 435. The court also ruled that administrative and executive acts or conduct is subject to Constitutional Court scrutiny, under which the Aliens Control Act falls. *Id.* at 436. This case, however, may be an anomaly since the petitioner was detained for over a year. Today, most detainees are held for shorter periods of time since repatriations occur faster, and most detainees do not have the financial resources to stall or halt the repatriation process. Human Rights Watch, *supra* note 5, at app. A, 8.

143. *Larbi-Odam v. MEC for Education (Northwest Province)*, 1998 (1) SALR 745 (CC).

144. *Id.* at 747. In line with the *Larbi-Odam* decision, in *Baloro and Others v. University of Bophuthatswana and Others*, 1995 (4) SALR 197 (BSC), the court ruled that a university's restrictions for promoting non-citizen teachers were unconstitutional. *See also* *Yuen v. Minister of Home Affairs and Another* 1998 (1) SALR 958 (C); *Foulds v. Minister of Home Affairs and Others* 1996 (4) SALR 137 (WPD) (mandating the government to disclose information pertaining to the detainee's repatriation in accordance with detainee's right to a fair trial); *Silva v. Minister of Safety and Security* 1997 (4) SALR 657 (WLD) (requiring Home Affairs and police officials to detain immigrants in a just manner).

process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and weakest among us that all of us can be secure that our own rights will be protected.¹⁴⁵

145. Klaarman, *supra* note 140 (quoting Arthur Chaskalson, president of the Constitutional Court, in *S v. Makwanyane and Another*, 1995 (3) SALR 391 (CC)).

